**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| STATE OF WASHINGTON, | ) | No. 63309-1-I |
| | ) | |
| Respondent, | ) | DIVISION ONE |
| | ) | |
| v. | ) | |
| | ) | |
| DIMITAR K. DERMENDZIEV, | ) | UNPUBLISHED |
| | ) | |
| Appellant. | ) | FILED: April 26, 2010 |
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| | ) | |

Cox, J. – An appellant seeking review under RAP 2.5(a)(3) must demonstrate that the claimed error is "manifest" and truly of constitutional dimension.[1] Here, the mother of the alleged victims testified as to the demeanor of the accused when she confronted him with allegations that he had sexually molested her children. This testimony was not improper opinion testimony and there was no error, either manifest or otherwise, in admitting it. The mother's testimony that she thought Dimitar Dermendziev did molest her daughter was not manifest error because Dermendziev has not shown that it had practical and identifiable consequences at his trial. The opinion testimony elicited by defense counsel was invited. Thus, we do not address it.

Dermendziev has not shown that his trial counsel was ineffective for either failing to object to the allegedly improper testimony on direct or eliciting

[1] State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

such testimony on cross.

We also conclude that the trial court's oral explanation of a ruling made during defense closing argument in response to a request by counsel was not an unconstitutional comment on the evidence.

The State properly concedes that the trial court imposed an incorrect term of post-release supervision, which must be corrected on remand. Accordingly, we vacate that portion of Dermendziev's sentence relating to post-release supervision for counts I, II, and III, and remand for resentencing as to that issue only. We affirm in all other respects.

Dermendziev and his wife Isabelle[2] have three children, daughter M.D. (d.o.b. June 2, 1990), and two sons, A.D. (d.o.b. June 6, 1992) and Al.D. (d.o.b. July 19, 1998). M.D., who was eighteen at the time of trial, testified that one day, when she was approximately six to eight years old and while her mom was not home, Dermendziev told A.D. to watch television and told M.D. to take a shower. After she got out of the shower, Dermendziev came into the bathroom as M.D. was getting dressed and carried her into his room. Dermendziev then laid M.D. on her back on his bed and placed a towel over her head, covering her face. M.D. testified that Dermendziev did not say anything to her, but took her underwear off and "used his mouth to do stuff" to her vagina. He also felt her vagina area with his hands. During the 20 minutes or so that this lasted, Dermendziev "made sounds like . . . he was enjoying it." Afterwards, M.D. felt

[2] We adopt the parties' use of Isabelle's first name for clarity.

"[g]ross and confused." She "didn't know what to do" and was scared and confused, so she did not tell anyone about what had happened.

M.D. recalled a similar incident happening a couple of months later. She testified that this time, she was sleeping in her parents' bed because she was scared, and her dad "touched my privates under my clothes while I was there." Though M.D. could not remember specifically each and every incident, she estimated that Dermendziev had this type of sexual contact with her around ten times. Her recollection was that the incidents stopped by the time she was in fourth or fifth grade.

The first time M.D. told someone about Dermendziev's actions was in second or third grade, when she told her mother, Isabelle. Dermendziev still had sexual contact with M.D. after that disclosure. The next time M.D. remembered telling someone about the sexual contact was in middle school, when she told two close friends. After telling these friends, M.D. also spoke with a school counselor about Dermendziev touching her. At some point, M.D. found out that Dermendziev had also sexually abused A.D., but she and A.D. did not discuss details of the abuse.

M.D. again told Isabelle that Dermendziev had touched her after she talked to the school counselor. M.D. also told Isabelle that she had told her friends and the counselor. Isabelle "still didn't believe it" but "called [Dermendziev] and I asked him." Isabelle testified that Dermendziev "didn't say nothing" but then said "I'm sorry if I did."

A.D. testified that he could remember two or three times that Dermendziev touched him inappropriately. Dermendziev touched and rubbed A.D.'s penis while A.D. was trying to go to sleep. A.D. testified he was five, six, or seven years old when this happened. Isabelle remembered that A.D. had once told her that Dermendziev "raped" him, but she did not ask him any questions about it.

In November 2007, Dermendziev, Isabelle, and A.D. met with a social worker and others from the Department of Social and Health Services for a "family team meeting" to discuss Dermendziev's request that A.D. be removed from the home. The social worker testified that A.D. got frustrated when Dermendziev "had been continually discussing his complaints about [A.D.] and what [Dermendziev] was angry about." A.D. "blurted out . . . [']all you do is hit us and rape us.[']" Neither parent reacted to this statement. The meeting facilitator asked A.D. if he wanted to say more, but he declined. The meeting facilitator reported the allegation to Child Protective Services (CPS). A.D. later told a CPS investigator that he had been joking when he made the statement.

In March 2008, A.D. met with his counselor, Helen Edwards, while in juvenile detention. A.D. had requested the meeting. At this meeting, A.D. told Edwards that Dermendziev had touched him when he "was little[,] around six or eight," that "it happened occasionally every week for a period of a month or two" and that it had possibly also happened to M.D. A.D. said that Dermendziev touched him "all over [his] body" and "touched [his] privates." Edwards called the family's social worker and CPS to report A.D.'s allegations.

A few days later, M.D. agreed to an interview with a CPS investigator and a police officer.

The State charged Dermendziev with four counts of child molestation in the first degree. Three counts were based on Dermendziev's sexual contact with M.D. One count was based on his sexual contact with A.D. A jury convicted Dermendziev as charged.

Dermendziev appeals.

## OPINION TESTIMONY

For the first time on appeal, Dermendziev argues that Isabelle's testimony at trial regarding M.D. and A.D. constitutes opinion testimony and manifest constitutional error that requires reversal. He argues in the alternative that he was denied effective assistance of counsel because his counsel failed to object to the testimony. We disagree with both claims.

### *Manifest Error*

"[T]he admission of opinion testimony may be manifest error affecting a constitutional right" that a defendant may raise for the first time on appeal.[3] "The general rule is that appellate courts will not consider issues raised for the first time on appeal."[4] The exception under RAP 2.5(a)(3) for manifest constitutional error is a "'narrow one.'"[5]

To establish manifest constitutional error, the defendant must establish

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[3] State v. Saunders, 120 Wn. App. 800, 811, 86 P.3d 232 (2004).

[4] Kirkman, 159 Wn.2d at 926 (citing RAP 2.5(a)).

[5] Id. at 934 (internal quotation marks omitted) (quoting State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988)).

actual prejudice.[6] To demonstrate actual prejudice, there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case.[7] In determining whether a claimed error is manifest, we view the error in the context of the record as a whole, rather than in isolation.[8]

As a general rule, it is improper for a witness to testify to a personal belief as to the credibility of a witness.[9] "Washington cases have held generally that weighing the credibility of a witness is the province of the jury and have not allowed witnesses to express their opinions on whether or not another witness is telling the truth."[1] The role of the jury is "to be held 'inviolate' under Washington's constitution."[11] Thus, impermissible testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by a jury.[12]

Lay witnesses may give opinions or inferences based upon rational perceptions that help the jury understand the witness's testimony and that are not based upon scientific or specialized knowledge.[13] To determine whether

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[6] O'Hara, 167 Wn.2d at 99.

[7] Id.

[8] State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008) (citing Scott, 110 Wn.2d at 688).

[9] See State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

[1] State v. Castaneda-Perez, 61 Wn. App. 354, 360, 810 P.2d 74 (1991).

[11] Montgomery, 163 Wn.2d at 590 (citing U.S. Const. amend. VII; Wash. Const. art. I, §§ 21, 22).

[12] Kirkman, 159 Wn.2d at 927.

[13] Montgomery, 163 Wn.2d at 591 (citing ER 701).

testimony constitutes an impermissible opinion on guilt or veracity, or a permissible opinion on an ultimate issue, a court should consider the totality of the circumstances, including the type of witness, the nature of the testimony and charges against the accused, the type of defense, and the other evidence.[14]

As to testimony regarding a victim's credibility, "even if there is uncontradicted testimony on a victim's credibility, the jury is not bound by it. Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary."[15] "'Manifest error' requires a nearly explicit statement by the witness that the witness believed the accusing victim."[16]

Here, the alleged error is that Isabelle, the mother of the alleged victims, "repeatedly testified she believed M.D. and A.D. when they claimed they were molested by Dermendziev." Thus, Dermendziev has raised alleged errors of constitutional dimension.[17] The issue is whether such error was "manifest" constitutional error reviewable for the first time on appeal.

Dermendziev cites two points in the report of proceedings to support his claim that the trial court admitted improper opinion testimony. The first instance occurred during the State's direct examination of Isabelle. Isabelle testified that when she finally confronted Dermendziev with M.D.'s abuse allegations, Dermendziev denied that he had done anything but said he was sorry "if he did."

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[14] State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); Kirkman, 159 Wn.2d at 928.

[15] Kirkman, 159 Wn.2d at 928.

[16] Id. at 936.

[17] See Kirkman, 159 Wn.2d at 927.

The prosecutor then asked Isabelle about Dermendziev's demeanor during this confrontation. Isabelle testified that Dermendziev got quiet and looked down. The prosecutor then asked,

> Q. Isabelle what did you think about the interaction with your husband when he said I'm sorry if I did. What did you think about that?
>
> A. That he did.
>
> Q. Is that how –
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> A. That was my thinking.
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> Q. Is that how he acted to you?
>
> A. Yes.[18]

The first portion of this testimony consisted of permissible "opinions or inferences based upon rational perceptions" of Dermendziev's demeanor.[19] Thus, it is not opinion testimony. There was no error in admitting this evidence.

The above-quoted portion of this testimony, specifically, Isabelle's statement "That he did," is not manifest error. As we discuss below, Dermendziev has not shown that he was prejudiced by this testimony because it had no practical and identifiable consequences at trial.[2]

The second instance of challenged testimony occurred during Dermendziev's cross-examination of Isabelle. Defense counsel asked,

> Q. Was there ever a time after you had learned, after [M.D.] had said my dad touched me was there ever a time when you did not believe her?

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[18] Report of Proceedings (February 4, 2009) at 647-48.
[19] See Montgomery, 163 Wn.2d at 591 (citing ER 701).
[2] See O'Hara, 167 Wn.2d at 99.

A. I believe her.

Q. You believe her now?

A. Yes.

Q. Was there ever a time when you did not believe her?

A. I always believe it but I didn't think that he did, no.

Q. You always believed her but you didn't think he did it?

A. Yeah, because I was trusting him that he was a good father.[21]

This testimony is a "nearly explicit statement by the witness that [she] believed the accusing victim."[22] But under the invited error doctrine, a party may not set up error at trial and then complain about the error on appeal.[23] Here, defense counsel's questions sought Isabelle's testimony about whether she believed M.D. Accordingly, we do not consider further whether the alleged error is manifest because it was invited.

Significantly, Dermendziev has not shown that either of the asserted errors had practical and identifiable consequences at trial.[24] He cites only to a portion of the State's closing argument in which the prosecutor argued that Dermendziev had nothing to say when confronted with the allegations by family members because, "what is he going to say? If I sit there and you have apologized to your daughter for doing it and your wife knows that you have done that and the kids, [A.D.] and [M.D.] know that this has been happening, what do

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[21] Report of Proceedings (February 4, 2009) at 696.
[22] Kirkman, 159 Wn.2d at 936.
[23] State v. Korum, 157 Wn.2d 614, 646, 141 P.3d 13 (2006).
[24] O'Hara, 167 Wn.2d at 99.

you say in this meeting?" In context, the State's argument that "your wife knows that you have done that" is not necessarily stressing any evidence that Isabelle believed the children. As described above, when Isabelle confronted Dermendziev herself with the allegations, he denied having done anything but was sorry "if I did." Isabelle took this to mean "[t]hat he did" molest the children. The challenged testimony was limited in the context of the entire trial.

Moreover, the jury heard testimony from both M.D. and A.D. regarding the charged crimes. It also heard testimony from several witnesses whose testimony supported M.D.'s and A.D.'s version of events. Dermendziev has not shown actual prejudice. Accordingly, he has failed to show manifest error.

Dermendziev argues that Isabelle's testimony was improper under State v. Jerrels[25] and State v. Fitzgerald.[26] He is mistaken.

In Jerrels, the defendant appealed his convictions for two counts of first degree rape of a child and two counts of first degree child molestation, which were based on crimes against his two stepchildren.[27] The court concluded that a prosecutor committed reversible misconduct where the prosecutor asked the victims' mother, three different times, to give her opinion as to her children's veracity.[28] Here, Dermendziev does not argue, nor does the record support, that the State committed misconduct with respect to opinion testimony. Moreover, the opinion testimony that was given was isolated and did not have the

[25] 83 Wn. App. 503, 925 P.2d 209 (1996).
[26] 39 Wn. App. 652, 694 P.2d 1117 (1985).
[27] Jerrels, 83 Wn. App. at 506.
[28] Id. at 508.

"cumulative effect" of the three separate elicitations in Jerrels.[29]

In Fitzgerald, another case involving the sexual abuse of children, the court concluded that the trial court erred in permitting a pediatrician to testify that she believed that the victims had been molested based solely on her judgment as to the credibility of those victims, without any objective evidence to substantiate the abuse.[3] Fitzgerald is inapposite here because it dealt with the limits of expert, rather than lay, opinions.

*Ineffective Assistance of Counsel*

Dermendziev next argues that he was denied effective assistance of counsel because his counsel failed to object to the State's elicitation of the testimony described above. We disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.[31] The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[32] To show prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different.[33] If one of the two prongs of the test is absent, we

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[29] See id.

[3] Fitzgerald, 39 Wn. App. at 656-57.

[31] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[32] McFarland, 127 Wn.2d at 336.

need not inquire further.[34]

The decision of when or whether to object is a classic example of trial tactics and only in "egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal."[35]

Here, as discussed above, Isabelle's testimony regarding the accused's demeanor elicited by the State was not improper. Thus, defense counsel had no basis for any objection to these remarks. Counsel's decision not to object was not objectively unreasonable.

As for the quoted portion of her testimony that we have discussed above, there is no showing of prejudice, as we have explained. Other witnesses gave testimony to support the charges. Dermendziev has not shown a reasonable probability that the outcome would have been different had counsel objected to the testimony.[36] Thus, the second prong of the ineffective assistance of counsel test has not been satisified.

Nor was counsel's questioning on cross-examination objectively unreasonable. Counsel had legitimate strategic reasons for the questions he asked. On direct examination, Isabelle had testified that after she found M.D. had told the school counselor about Dermendziev touching her, Isabelle asked

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[33] In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

[34] Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007 (2007).

[35] State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

[36] See In re Pirtle, 136 Wn.2d at 487.

M.D., "why you do that to our family? Because I still didn't believe it and I didn't ask any more question[s]." On cross-examination, defense counsel asked Isabelle, "Was there ever a time after you had learned, after [M.D.] had said my dad touched me was there ever a time when you did not believe her?" It appears that defense counsel sought to emphasize Isabelle's earlier testimony that she did not initially believe M.D.'s allegations. This would support the overall defense theory that M.D. and A.D.'s allegations were false. But instead of answering consistently with her testimony on direct examination, Isabelle appears to have testified otherwise than as counsel expected. The fact that a witness did not answer a question as counsel reasonably expected, based on that witness's testimony on direct examination, is not attributable to counsel's conduct. In short, there was no deficient performance by counsel.

Because Dermendziev fails in his burden to prove both prongs of the governing test for ineffective assistance of counsel for each of the claimed instances, we conclude that there was no ineffective assistance of counsel.

**COMMENT ON THE EVIDENCE**

Dermendziev argues that the trial court improperly commented on the evidence in its oral statement clarifying the scope of its ruling on an objection during closing argument. We disagree.

Article IV, section 16 of the Washington State Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A statement by the court constitutes a

comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement.[37] "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury."[38]

The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury.[39] "[T]he court does not comment on the evidence simply by giving its reasons for a ruling."[4]

If the reviewing court determines the trial judge's remark constitutes a comment on the evidence, the burden is on the State to show that a defendant was not prejudiced based on the record below.[41]

Here, the claimed error occurred in the context of Dermendziev's closing argument. Dermendziev's counsel argued,

> Now, if you believe the State's version, then you believe that Mr. Dermendziev is a pedophile. He is a person that prays on children to satisfy sexual desires.[42]

The State objected, stating, "[C]learly that hasn't been the State's version. That's not the only thing this jury can believe. It isn't cut and dried in that form . . . ."[43] The trial court sustained the State's objection.[44] Defense counsel then

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[37] State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).
[38] Id.
[39] Id.
[4] State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005) (citing State v. Cerny, 78 Wn.2d 845, 855-56, 480 P.2d 199 (1971)).
[41] Id. at 838-39.
[42] Report of Proceedings (February 5, 2009) at 923.
[43] Id.

asked, "I don't quite understand what the ruling is as – is it over the word pedophile?"[45] The trial court responded,

> I think it goes beyond that in that you began comments by saying if you believe the State's version then you believe, et cetera, the State has a specific burden of proof. The State has a heavy burden of proof but it has a specific burden of proof and the State's evidence has been elicited simply to satisfy that burden of proof. Not to place if you will any larger labels on them. Just to come forth with the evidence to prove beyond a reasonable doubt that the alleged acts occurred. Certainly nothing less. But the State is attempting to prove nothing more, either.[46]

Dermendziev argues that this statement "signaled to the jury that the trial judge believed the State presented sufficient evidence to prove Dermendziev guilty beyond a reasonable doubt." That is not a reasonable reading of this record.

The trial court properly gave its reasons for sustaining the State's objection at defense counsel's request for clarification. "[T]he court does not comment on the evidence simply by giving its reasons for a ruling."[47] The statement did not communicate the court's attitude toward the merits of the case.[48] There was no comment on the evidence.

Dermendziev argues that the court's comment is similar to one found erroneous in City of Seattle v. Arensmeyer.[49] But Arensmeyer is not persuasive here. There, the trial court interrupted defense counsel during closing argument

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[44] Id.
[45] Id.
[46] Id. at 923-24.
[47] Dykstra, 127 Wn. App. at 8 (citing Cerny, 78 Wn.2d at 855-56).
[48] See Lane, 125 Wn.2d at 838.
[49] 6 Wn. App. 116, 491 P.2d 1305 (1971).

and stated, "Just a minute-that isn't the testimony. . . ."[5] The court went on to describe specific details about two witnesses' testimony.[51] On review, this court concluded that defense counsel's argument had been based on reasonable inferences.[52] When the trial court interrupted counsel "to say that he was mistaken as to the evidence" and ruled as it did, the trial court "commented on the evidence by revealing what it believed the evidence to mean."[53]

Dermendziev argues that Arensmeyer is analogous to his case because the trial court "wrongly interfered with a valid defense argument" and "signaled to the jury that it believed the State had met its burden of production." But here, unlike the court in Arensmeyer, the trial court did not "reveal what it believed the evidence to mean."[54] Instead, the trial court explained that the State's burden of proof is specific and that the State need only prove "that the alleged acts occurred." This was not an unconstitutional comment on the evidence.

**SENTENCING**

Dermendziev argues that the trial court erred in imposing a longer term of post-release supervision for three counts of his conviction than authorized by statute. The state properly concedes error.

Courts must correct an erroneous sentence upon discovery.[55] Under

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[5] Id. at 119-20.
[51] Id. at 120.
[52] Id. at 120-21.
[53] Id.
[54] Arensmeyer, 6 Wn. App. at 121.
[55] In re Pers. Restraint of Call, 144 Wn.2d 315, 331-32, 28 P.3d 709 (2001).

RCW 9.94A.345, sentences imposed under the Sentencing Reform Act of 1981, chapter 9.94A RCW (SRA), "shall be determined in accordance with the law in effect when the current offense was committed."

Here, counts I, II, and III of Dermendziev's conviction were based on a timeframe "between June 2, 1996, to June 2, 1999." Between June 2, 1996, and June 5, 1996, the applicable version of the SRA provided:

> When the court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense . . . committed on or after July 1, 1990, the court shall in addition to the other terms of the sentence, sentence the offender ***to community placement for two years*** or up to the period of earned release in accordance with RCW 9.94A.150(1) and (2), whichever is longer. . . .[56]

After June 5, 1996, however, the applicable version of the SRA provided:

> When a court sentences a person to the custody of the department for an offense categorized as a sex offense committed on or after June 6, 1996, the court shall, in addition to other terms of the sentence, sentence the offender ***to community custody for three years*** or up to the period of early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer.[57]

Thus, if the 1995 version of RCW 9.94A.120 applies to the three counts at issue, the trial court was authorized to impose only a two-year term of community placement.

Here, the trial court appears to have applied the post-June 5, 1996 version because it imposed a 36-month term of "Community PLACEMENT/Community CUSTODY/Community SUPERVISION" on each of the four counts.

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[56] Former RCW 9.94A.120(9)(b) (1995) (emphasis added).
[57] Former RCW 9.94A.120(10)(a) (1996) (emphasis added).

Our supreme court addressed a similar situation in State v. Parker.[58] Parker was charged with committing crimes during a five-year period.[59] The penalties for those crimes were increased during the fourth year of the period.[6] The court concluded that "[u]se of the increased penalties without requiring the State to prove the acts occurred after the effective dates of the increased penalties would violate the ex post facto clause of both the United States and Washington Constitutions."[61]

The State properly concedes error under Parker. Because the State was not required to prove the acts occurred after the effective dates of the increased penalties, the trial court's sentence was erroneous. Accordingly, we vacate the terms of community custody on counts I - III only and remand for resentencing on that matter only.

**ADDITIONAL GROUNDS FOR REVIEW**

Dermendziev filed a pro se Statement of Additional Grounds for Review raising several additional issues. We conclude that none of them requires reversal.

A number of Dermendziev's arguments challenge the credibility of the witnesses at his trial. This court does not review a jury's credibility determinations.[62]

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[58] 132 Wn.2d 182, 937 P.2d 575 (1997).
[59] Id. at 191.
[6] Id.
[61] Id. (citing State v. Gurrola, 69 Wn. App. 152, 158-59, 848 P.2d 199 (1993); U.S. Const. art. I, § 9; Wash. Const. art. I, § 23).
[62] State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997) ("Credibility

Dermendziev argues that his counsel was ineffective for failing to take certain actions that Dermendziev deemed appropriate and necessary. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.[63] Legitimate trial strategy or tactics cannot serve as a basis for the claim.[64] The record indicates that Dermendziev's counsel had valid legal or tactical reasons for each of these alleged omissions, including counsel's decision to not file a motion to dismiss that Dermendziev requested.

Several other issues, such as an allegation of prosecutorial misconduct, are not supported by the record, were not raised at trial, and are without merit.

Dermendziev also raises issues regarding his conditions of pre-trial confinement and his right to a speedy trial. There is no evidence in the record to support these arguments and we do not consider matters outside the record in a direct appeal.[65]

We vacate the terms of community custody on counts I - III and remand for resentencing on those matters only. We otherwise affirm the judgment and sentence.

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determinations are within the sole province of the jury and are not subject to review.").

[63] Strickland, 466 U.S. at 687; McFarland, 127 Wn.2d at 334-35.

[64] State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

[65] McFarland, 127 Wn.2d at 335.

Cox, J.

WE CONCUR:

Spearman, J.

Grosse, J.